80-1964

No. _____

In The

SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

October Term, 1980

HOLIDAY MOBILE HOME RESORTS, INC.,
an Arizona Corporation, and
WILFRED O. DUNKEL,

Petitioners,

R. DIXON WOOD and DON W. HEIPLE,

Repondents.

On Writ of Certiorari to the Arizona Court
of Appeals Division One

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

When the United States District Court in a Bankruptcy proceeding has entered an order, which has become final, granting a party a legal mortgage on property previously subject to a Chapter X proceeding, which mortgage is specified as to its terms, including interest, may a State Court collaterally attack and interfere with a final Order and Judgement of the United States District Court by modifying the terms of such mortgage?

LIST OF ALL PARTIES

As filed in the Arizona Superior Court, in and for the County of Maricopa, and as appealed to the Court of Appeals of the State of Arizona, this action listed the following parties:

R. DIXON WOOD and DON W. HEIPLE, Plaintiffs; HOLIDAY MOBILE HOME RESORTS, INC., an Arizona corporation, and WILFRED O. DUNKEL, Defendants.

In this petition for certiorari the parties are Holiday Mobile Home Resorts, Inc., an Arizona corporation, and Wilfred O. Dunkel, Petitioners v. R. Dixon Wood and Don W. Heiple, Respondents.

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The Actions of the Arizona Court of Appeals, Division One, in modifying the interest provisions and terms embodied in a final Order of the United States District Court, was a collateral attack on the federal order, and enroached upon federal authority.

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HOLIDAY MOBILE HOME RESORTS, INC.,
an Arizona Corporation, and
WILFRED O. DUNKEL,
Petitioners,

v.

R. DIXON WOOD and DON W. HEIPLE,
Respondents.

On Writ of Certiorari to the
Arizona Court of Appeals,
Division One

PETITION FOR A WRIT OF CERTIORARI

Holiday Mobile Home Resorts, Inc., an Arizona corporation, and Wilfred O. Dunkel, petition for a Writ of Certiorari to review the judgment of the Arizona Court of Appeals, Division One, entered in this case on December 26, 1980, with review denied by the Arizona Supreme Court on February 18, 1981.

OPINIONS BELOW

The opinion below is reported as *Wood v. Holiday Mobile Resorts, Inc.*, 625 P.2d 337 (1981); review by the Arizona Supreme Court was denied February 18, 1981.

JURISDICTION

The Petition for Certiorari seeks review of the decision of the Arizona Court of Appeals, Division One, as filed on December 26, 1980 and reported as *Wood v. Holiday Mobile Home Resorts, Inc.*, 625 P.2d 337 (1981). Petition for Re-hearing was denied on January 28, 1981. A Petition for Review to the Arizona Supreme Court was denied on February 18, 1981.

Jurisdiction in the United States Supreme Court is provided by 28 U.S.C. §1257(3), and certiorari is sought by Petitioners pursuant to Rule 17.1(c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

This case involves the due process clause of Section I of the Fourteenth Amendment to the United States Constitution which provides in pertinent part: "(N) or shall any state deprive any person of life, liberty, or property, without due process of law." Further, the statute, 28 USC §1334, is involved, which states: "The District Courts shall have original jurisdiction, exclusive of the Courts of the States, of all matters and proceedings in bankruptcy.

The supremacy of the Federal Court's Rulings over State Court's Rulings is also applicable as stated in Article 3, §1 of the Constitution, which says: "The judicial Powers of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Article VI, paragraph 2 states: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

In 1974, a limited partnership entitled Holiday Isle was formed, with an Arizona Corporation, Holiday Mobile Home Resorts, Inc., as a general partner, with various individuals as limited partners. Holiday Isle owned and managed a mobile home park in Tucson, Arizona. The general partner, Holiday Mobile, at the time also controlled two wholly-owned subsidiaries, Holiday Spa, Inc., and Holiday Village, Inc., which were operated in Maricopa County, Arizona.

Under the articles of partnership, Holiday Mobile, as a general partner, was to be responsible for the overall management and supervision of Holiday Isle. Almost from the beginning, the limited partnership, Holiday Isle, had financial difficulties in running the mobile home park. The mortgage holder, Western Savings & Loan, threatened foreclosure in 1966, and the limited partnership was placed in a state of receivership. In 1971 a former stockholder of Holiday Mobile, the general partner, petitioned to place the corporation into federal bankruptcy proceedings under Chapter X of the Bankruptcy Act.

A review of the official Bankruptcy Court files reveals that the Court commenced to exercise jurisdiction over Holiday Isle, Ltd. on March 23, 1971, when U.S. District Judge Carl Muecke signed a General Stay Order. At that

time, Holiday Isle, Ltd., was characterized as a "subsidiary" corporation and it's property was refered to as "property owned by the debtor." Thereafter, in essentially every pleading and document filed with the court, Holiday Isle is referred to as a "subsidiary" corporation and it's property was referred to as property of the debtor. Notice was duly mailed to the Respondents herein with respect to all of the bankruptcy proceedings. In each of the mailings, Holiday Isle is referred to as a "subsidiary" and any reasonable reading of all the notices reveals that it's property was subject to the Chapter X Bankruptcy proceedings.

During the Chapter X proceeings, the Trustee in Bankruptcy was approached by Mr. Wilfred O. Dunkel, a majority stockholder in two corporations, Consolidated Security Corporation, a holding company, and National Mobile Development Company, a company which owns and manages several mobile home parks in Arizona and elsewhere. Mr. Dunkel proposed to the Trustee in Bankruptcy that he would provide him with a letter of credit of $1,200,000.00 issued by the First National Bank of Arizona, which was secured by a pledge of stock owned by Mr. Dunkel, and $50,000.00 cash to liquidate or bring current all of Holiday Mobile's debts. In return, Consolidated Security Corporation was to receive 66% of all the common stock of Holiday Mobile, and was to acquire mortgages on all the real property owned by Holiday Mobile, and "it's subsidiaries."

The Dunkel proposal was accepted by the Trustee, and subsequently approved by the Referee in Bankruptcy and the Federal District Court by a formal written order dated July 8, 1971, (see Appendix A). As a result of this transaction, a formal Realty Mortgage was prepared and executed by the Trustee in Bankruptcy, and the general partner, Holiday Mobile, which mortgage encumbered any real property owned by Holiday Village, Inc., Holiday Spa, Inc., and Holiday Isle, a limited partnership. This docu-

ment was then recorded in the Maricopa County Recorder's office on August 10, 1971, in Docket 8874, Pages 24-47, and in the Pima County Recorder's Office on August 26, 1971, in Docket 4068, Pages 304-324. The salient provisions of the Realty Mortgage and Court Order provided that Mr. Dunkel would receive 12% interest on any of the properties involved in the bankruptcy proceedings.

The Trustee in Bankruptcy then used $191,676.00 of the letter of credit furnished by Mr. Dunkel to pay off debts and obligations of the limited partnership, Holiday Isle.

On April 8, 1974, the Respondents, as limited partners, petitioned the Arizona Superior Court, Maricopa County, for dissolution of the partnership. As part of their suit, they also requested the Court that Mr. Dunkel's mortgage be invalidated as to the partnership property, Holiday Isle. The Respondents also petitioned the United States Bankruptcy Court, District of Arizona, to re-open the Chapter X proceedings with the intent to invalidate the Dunkel mortgage. The District Court, upon the recommendation of the Referee in Bankruptcy, dismissed the Respondent's petition to re-open, and deferred any action to the State Court.

This matter was tried in the Arizona Superior Court, Maricopa County, which judgment resulted in an appeal to the Arizona Court of Appeals, Division One.

The opinion of the Court of Appeals, Division One, (see Appendix B), held that Mr. Dunkel was entitled to an equitable mortgage on the partnership property, primarily because the partnership had received a benefit from the use of Mr. Dunkel's money. However, the Court of Appeals limited interest on Mr. Dunkel's mortgage to 6%, substantially lower than the amount provided in the District Court Order.

REASONS FOR GRANTING THE WRIT

The Arizona Court of Appeal's decision modified the clear and specific terms of the order of the Federal District Court in the bankruptcy proceedings, which thus impermissibly attacks the federal court order.

The contention of Respondents throughout the State Court proceedings has been that since Holiday Isle, Ltd., was a partnership, it was not subject to the jurisdiction of the Bankruptcy Court and that Respondents were not "noticed" of the Chapter X proceedings. Therefore, the Respondents contended that it was improper for a mortgage to be executed on the partnership property.

As reiterated above, Mr. Wilfred O. Dunkel made a proposal to the Trustee in Bankruptcy to advance certain sums of money for the purpose of paying all debts (including debts of the partnership property) to salvage the estate from bankruptcy. As consideration for this proposal, Mr. Dunkel would receive as security a mortgage on all properties then involved in the bankruptcy proceeding. On June 9, 1971, Vincent D. Maggiore, as special master, recommended to the Honorable Carl A. Muecke, Judge of the United States District Court, that an order be entered pursuant to the proposal of Mr. Dunkel. The Court then mailed copies of a Notice of the proposed order to all of the parties involved, including the Respondents. In addition, there appears in the Court's file an Affidavit of Publication which reflects that the proposed order was duly published in a newspaper of general circulation on January 11, 1971.

Throughout the bankruptcy court proceedings, the partnership property was treated as a subsidiary of the corporate general partner, and such partnership received the benefit of Mr. Dunkel's proposal.

The Arizona Court of Appeals apparently recognized the benefit extended to the partnership property by Mr. Dunkel in that it awarded Mr. Dunkel an equitable mortgage on such property. This equitable mortgage was consistent with the bankruptcy court order, except that the Court of Appeals reduced the interest on such equitable mortgage to six percent (6%) per annum, which the Court stated appeared to be the prevailing market rate at the time of the transaction.

This very determination by the Court of Appeals as to what the market rate was or was not encroaches directly on the District Court's Order. It is presumed that the District Court had available to it at the time it rendered its Order sufficient evidence to justify a market rate of twelve percent (12%) per annum.

It should be pointed out to the Court that Mr. Dunkel's mortgage was a second mortgage, junior to Western Savings and Loan. It is therefore presumed that the Court of Appeals ignored that it was literally impossible for a bankrupt mobile home park to borrow funds at 6% on the strength of a second mortgage as security for a loan. There was considerable evidence at trial which indicated that it would be very difficult for an individual to obtain a second mortgage for anything less than 14-18%, plus at least 5 points (Transcript of record, p. 62).

The bankruptcy proceedings were extensive. If the 12% interest rate was unacceptable, then the Respondents should have raised that issue in the bankruptcy proceedings. The Bankruptcy Court apparently had sufficient evidence before it to conclude that the interest rate of 12% proposed by Mr. Dunkel was both reasonable and

acceptable as consideration for salvaging the bankrupt estate. For the Court of Appeals to modify the terms of the Bankruptcy Court Order would be a collateral attack upon the District Court's Order.

In the case of *Cutter v. Huston*, 158 U.S. 423, 399 L. Ed 1040, 15 S.Ct. 868 (1895), judgment was obtained upon a note in a Federal Circuit Court. However, there was a question as to whether the Federal Court had jurisdiction because of diversity to enter the judgment. Regardless of this, this Court stated that such determination was not subject to a collateral attack in a garnishment proceeding brought in state court.

Further, the Supremacy Clause of the U.S. Constitution has conferred certain powers on the Federal Court. When decisions are made after a federal court has exercised its proper jurisdiction, those decisions cannot be collaterally attacked, except upon direct review. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 76, 60 S.Ct. 320 (1939); *Royal International Optical Co. v. Texas State Optical Co.*, 92 N.M. 237, 586 P.2d 318 (1978).

Finally, 28 U.S.C. §1334, cited above, confers upon the District Court of the United States original jurisdiction, exclusive of the state courts, of all matters and proceedings in bankruptcy. Since the realty mortgage sought to be invalidated by Respondents in the state court grew out of a federal bankruptcy proceeding, was sanctioned by such court, presumably with all competent evidence before it, the state court encroached upon such federal authority by attempting to modify the very terms of the federal bankruptcy order. In this respect, the State Court has impermissibly collaterally modified the federal bankruptcy court order by providing an alternate interest rate for the Dunkel mortgage.

CONCLUSION

We respectfully submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May, 1981.

Appendix A-1

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ARIZONA
PHOENIX DIVISION

IN THE MATTER OF :

HOLIDAY MOBILE HOME RESORTS, INC., an Arizona corporation,	IN PROCEEDINGS FOR THE REORGANIZATION OF A CORPORATION
Debtor.	NO. B 71-442 PHX
	ORDER

At Phoenix, in said District, on the 8th day of July, 1971, the Court having received the recommendation of the Honorable Vincent D. Maggiore, Special Master herein, relative to the proposal by the debtor for payment of all its debts and the termination of these proceedings under Chapter X, and the Court having reviewed said proposal and all matters on file herein, and objections to said proposal having been filed by Western Savings & Loan Association and First Federal Savings & Loan Association, and the debtor and Wilfred O. Dunkel and each of the objecting parties having stipulated in open Court to certain modifications in the debtor's proposal relative to increasing the rate of interest on the first mortgages and modification of other terms as hereinafter set forth, and said objections thereafter having been withdrawn in open Court, and it appearing that pursuant to said proposal, as modified, all the known creditors of the debtor corporation will be paid in full, together with the Trustee's fees and other expenses arising out of these proceedings, and that such will be in the best interests of all creditors and stock-

holders of the debtor corporation and that none of them will be prejudiced or damaged thereby, and Wilfred O. Dunkel having heretofore deposited with the Trustee herein the sum of $50,000.00 cash, and having caused to be delivered to the Trustee an irrevocable letter of credit in the amount of $1,200,000.00 issued by the First National Bank of Arizona, and the Trustee having other funds now on hand from his operation of the Mobile Home Park of the debtor corporation and its subsidiaries in excess of $25,500.00.

IT IS HEREBY ORDERED:

1. That the Trustee, David L. Roberts, forthwith give notice by regular mail, postage prepaid, on or before July 15, 1971, to all creditors set forth on the list of creditors on file herein or otherwise known to the Trustee, to file with the Trustee (David L. Roberts, Trustee, 48 North MacDonald Street, Mesa, Arizona 85201) proof of their respective claims, in duplicate, on or before August 15, 1971, and any such creditor not so filing its claim herein shall be forever barred from asserting said claim thereafter.

2. That the said Wilfred O. Dunkel and the debtor corporation, as well as the Trustee herein, shall have the right to object to the allowance of any of the creditors' claims that may be filed herein, provided such objections are made in writing and filed with the Court within 30 days after the expiration of time allowed for the filing of such claims, and any such objection shall be heard and summarily determined by the Special Master.

3. That the possession and control of all of the assets of the debtor corporation and its subsidiaries, except the sum of $25,500.00 and an additional amount equal to the amount of any taxes, utilities, debts or accounts incurred by the Trustee since the time of his appointment herein and presently unpaid be, and the same are hereby

returned to the debtor corporation at 12:01 A.M. on July 16, 1971, and the Trustee herein is directed to relinquish his possession and control thereof to the debtor corporation as of said date and time, except that with respect to cash, the Trustee shall have a reasonable time to determine the amount of cash to be retained by him as above described, and the balance paid over to the debtor corporation.

4. That the mortgages held by Western Savings and Loan Association on Holiday Village Mobile Home Park and Holiday Isle Mobile Home Park shall, upon payment by the Trustee herein of all delinquent amounts due thereon at the time of such payment, except claimed attorneys' fees (said delinquent amounts to be reflected on an approved claim filed herein) be reinstated without acceleration of the principal; provided, however, that the interest rate on each of said mortgages shall be at the rate of seven and one-half percent (7½%) per annum commencing as of the 5th day of the calendar month in which reinstatement is made, and continuing for a period of seven and one-half (7½) years (90 months) thereafter, and commencing upon expiration of said seven and one-half year period the interest rate thereon shall be at the rate of eight percent (8%) per annum until paid, and provided further, that either or both of said mortgages may at the option of the debtor corporation be paid in full or at an accelerated rate at any time without any prepayment penalties. It is specifically provided that the monthly installments of principal and interest on each of said mortgages shall remain the same as originally provided in said mortgages and the notes secured thereby.

5. That the mortgage held by First Federal Savings and Loan Association on Holiday Spa Mobile Home Park shall, upon payment by the trustee herein of all delinquent amounts due thereon at the time of such payment, except any claimed attorneys' fees (said delinquent amounts to be reflected on an approved claim filed herein), be

reinstated without acceleration of principal; provided, however, that the interest rate on said mortgage shall be at the rate of seven and one-half percent (7½%) per annum commencing as of the 20th day of the calendar month in which reinstatement is made. It is specifically provided that the monthly installments of principal and interest on said mortgage shall remain the same as originally provided in said mortgage and the note secured thereby.

6. That the said $50,000.00 heretofore deposited with the Trustee by the said Wilfred O. Dunkel, plus the sum of $25,500.00 to be withheld by the Trustee from the funds he now has on hand, together with such amounts as the Trustee may hereafter draw under the irrevocable letter of credit referred to above, shall be known and hereafter referred to as the Special Fund.

7. That each creditor's claim may be paid by the Trustee herein from the Special Fund when such claim is allowed by the Court or no objection is filed thereto within the time allowed for such objections, or when objections to such claim are waived by the debtor corporation and Wilfred O. Dunkel, except that the mortgages held by Western Savings & Loan Association and First Federal Savings & Loan Association above described shall be paid only the amount required to cover all delinquent amounts then due thereon without acceleration of the principal.

8. That the Trustee's fees, Referee's salary and expense fund and other expenses arising out of these proceedings be paid out of the Special Fund after approval by the Court.

9. That until final dismissal of these proceedings, the monthly installments of principal, interest and impoundment accruing on the Western Savings & Loan Association mortgages after July 5, 1971, and accruing on the First Federal Savings & Loan Association ,mortgage after June 20, 1971, shall be paid by the debtor corporation to the Trustee herein as a part of the Special Fund or directly to the respective mortgages.

10. That this Court shall retain jurisdiction in these proceedings until payment or settlement in full of all such creditors' claims, together with the Trustee's fees and other expenses arising out of these proceedings,including the liabilities and expenses incurred by the Trustee during these proceedings, and that thereupon a final dismissal of these proceedings shall be entered, and any surplus then remaining in said Special Fund shall be returned to the said Wilfred O. Dunkel.

11. That Wilfred O. Dunkel shall receive as security for the total amount of money provided by him for the Special Fund, mortgages on all property owned by the debtor corporation and its subsidiaries, junior only to the mortgages thereon presently held by Western Savings & Loan Association and First Federal Savings & Loan Association, providing for interest at the rate of 12% per annum and an amortization period of fifteen years, and the Trustee is hereby directed to execute and deliver same.

WILLIAM P. COPPLE, Judge

William P. Copple, Judge
of the United States District Court

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Appendix B-1

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

R. DIXON WOOD and DON W. HEIPLE, Plaintiffs-Appellees and Cross-Appellees, v. HOLIDAY MOBILE HOME RESORTS, INC., an Arizona corporation, and WILFRED O. DUNKEL, Defendants-Appellants and Cross-Appellants	1 CA-CIV 4591 DEPARTMENT B O P I N I O N

Appeal from the Superior Court of Maricopa County
Cause No. C-291070
The Honorable Harold D. Martin, Judge
AFFIRMED IN PART; REVERSED IN PART; REMANDED

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J A C O B S O N , Acting Presiding Judge

The basic issue in this appeal is whether the trial court, upon an advisory jury's findings, properly ordered the dissolution of a limited partnership, and an accounting.

The facts surrounding this litigation and the various assertions of the various parties are complex and involved. This action was commenced by plaintiffs-appellees, R. Dixon Wood and Don W. Heiple (hereinafter referred to as "limited partners"), against defendant-appellant, Holiday Mobile Homes Resorts, Inc. (Holiday Mobile) and Wilfred O. Dunkel (Dunkel), seeking a dissolution and an accounting of the limited partnership known as Holiday Isle Mobile Home Park (Holiday Isle) and an adjudication of the rights of the various parties assets of Holiday Isle.

The defendants, Holiday Mobile and Dunkel, filed counterclaims in that action, which were subsequently dismissed by way of summary judgment. The counterclaims were based upon allegations of intentional interference with contractual relationships.

After a timely request for findings of fact and conclusions of law, the matter was tried to the court with an advisory jury. The advisory jury returned a verdict in favor of the limited partners and declared that the partnership should be dissolved and that there should be an accounting. Following the jury's verdict, the trial court ordered an accounting and took under advisement the jury's verdict as to dissolution. ' The limited partners then made an application for attorney's fees, which was denied.

The limited partners, following the jury's verdict, applied for the appointment of a special master to conduct the accounting and for the appointment of a receiver. While the trial court, by minute entry, granted those motions, no further action was taken by the trial court for the appointment of a receiver. The trial court did, however, appoint J. Frank Sergent, a C.P.A.

recommended by the defendants, to conduct an accounting.

Subsequently, Mr. Sergent submitted an audit report which was the subject of an in-chambers hearing before the trial judge on September 5, 1978. At that hearing, the limited partners submitted proposed findings of fact and conclusions of law, a proposed judgment and objections to the Sergent audit report. The court took no action on these matters at that hearing, except that the trial judge did announce his intention to order the dissolution of the limited partnership as requested by the limited partners.

Subsequently, on September 6, 1978, the defendants lodged a proposed form of judgment with the trial court which was immediately signed, without hearing and without any findings of fact or conclusions of law being entered. Although the limited partners objected to portions of the Sergent audit report which they contended were beyond the scope of the audit, the trial court denied them a hearing on these objections. Nevertheless, in the September 6, 1978, judgment signed by the trial judge and submitted by the defendant, the Sergent report was "approved by the Court."

The limited partners then filed objections to the defendant's form of judgment, a motion to amend judgment, and a motion to make additional findings. Without hearing, the trial judge denied all the limited partners' objections and motions.

The defendants then filed their notice of appeal and the limited partners their cross-appeal. While the trial court's judgment has ordered dissolution of the limited partnership, no receiver has been appointed. This court is unaware of: how the trial court treated the Sergent audit report except that it was "approved"; whether various legal contentions of the parties have been ruled upon by the trial court; and whether the trial court's judgment has disposed of all the legal issues presented by the parties. Apparently, the defendant has continued the active

management of the limited partnership assets since the trial of this matter.

Simply by way of preface, the judges of this court, in their appellate experience, have not seen a more complete abrogation of judicial responsibility than is presented by the trial judge's inaction in this case. This matter was simply allowed to drift in spite of a trial and the fact finding efforts of the advisory jury.

The facts show that the Holiday Isle limited partnership was formed in 1964, with the corporation, Holiday Mobile, as the general partner and various individuals as limited partners. Holiday Isle was to own and manage a mobile home park in Tucson, Arizona. The mobile home park was financed by Western Savings & Loan Association, which took a mortgage on the limited partnership real property.

The general partner, Holiday Mobile, at this time also controlled two wholly-owned subsidiaries, Holiday Spa, Inc. and Holiday Village, Inc. These wholly-owned subsidiaries owned and operated mobile home parks in Maricopa County.

Under the articles of partnership, Holiday Mobile, as the general partner, was to be responsible for the overall management and supervision of the mobile home park "all without fee; provided, however, that the general partner shall be reimbursed for any actual costs or expenses incurred in performing these tasks," such actual costs and expenses to be a partnership expense.

Moreover, the articles of partnership required the general partner to provide the limited partners with a detailed monthly accounting and to provide an annual audit prepared by a certified public accountant. These reports had not been provided for some 10 years prior to this litigation.

Almost immediately following the formation of the limited partnership, financial difficulties were encountered. The mortgage holder threatened foreclosure and in 1966 the limited partnership was placed in a state receivership. In 1971, a former

stockholder of Holiday Mobile petitioned to place that corporation into federal bankruptcy proceedings under Chapter X of the Bankruptcy Act. Holiday Mobile consented to these proceedings and David Roberts was appointed as trustee of Holiday Mobile. As such trustee, Mr. Roberts undertook the management of Holiday Isle, the limited partnership.

At this point, the defendant Dunkel entered the scene. Dunkel is the chairman of the board, president, and owner of a majority of the stock in two corporations, Consolidated Security Corporation, a holding company, and National Mobile Development Company, a company which owns and manages several mobile home parks in Arizona and elsewhere.

Dunkel made a proposal to the trustee in bankruptcy whereby he would provide the trustee with a $1,200,000 letter of credit issued by First National Bank of Arizona, which was secured by a pledge of stock owned by Dunkel, and $50,000 cash to liquidate or bring current all of Holiday Mobile's debts. In return, Consolidated Security Corporation was to receive 66% of all the common stock of Holiday Mobile and was to acquire mortgages on all the real property owned by Holiday Mobile and "its subsidiaries."

The Dunkel proposal was accepted by the trustee and subsequently approved by the referee in bankruptcy and the federal district court. As the result of this transaction, Dunkel not only received a mortgage from Holiday Mobile on the real property owned by it and its subsidiaries, Holiday Spa, Inc. and Holiday Village, Inc., but in addition, Holiday Mobile, as general partner, executed a mortgage on the real property owned by Holiday Isle, the limited partnership. The Dunkel mortgage on all three properties is in the face amount of $1,250,000, although Dunkel through accounting procedures has prorated this amount based upon the market value of the three properties. There is no question but that the limited partners did not approve the

encumbering of the limited partnership property. However, there is a sharp conflict in the evidence as to whether the limited partners by reason of their participation in the federal bankruptcy proceedings were aware that as part of the Dunkel financing plan, the Holiday Isle property was to be encumbered. Their subsequent failure to make any objection, it is argued, leads to an estoppel. The trial court's judgment does not resolve this issue.

In any event, it is clear that the funds generated by Dunkel were used by the trustee to pay off the obligations of the limited partnership, Holiday Isle, in the sum of $191,676.60[1] This sum consists of paying $138,624.20 to Western Savings to bring the Holiday Isle mortgage current; $29,621.14 owed creditors of Holiday Isle; and $23,431.26 in back taxes owed by Holiday Isle.

Dunkel, following the approval of the bankruptcy court, entered into the active management, through the general partner, Holiday Mobile, of the limited partnership. This management took the form of having National Mobile Development Company, in which Dunkel owns 63% of the common stock, receive a $75,000 loan from Holiday Isle. Holiday Mobile in turn entered into a management agreement with National Mobile Development whereby National Mobile was to receive 6% of the Holiday Isle partnership gross receipts as "management fees" to be offset against National Mobile's $75,000 indebtedness to Holiday Isle.

Under this management agreement the limited partnership, at least on paper, has flourished; its debts are current; the mobile park is filled to 100% capacity; and the value of its underlying real property has appreciated. However, as of the time of trial none of the limited partners had received one cent. The limited partnership, however,

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1 The sum of $220,123 is carried on the Holiday Isle books as being received under this transaction. The difference in these two sums represents expenses of the trustee in bankruptcy which we deem not to be payment of expenses or liabilities of Holiday Isle.

has paid out $232,252 to Dunkel in principal and interest on the Dunkel mortgage and National Mobile Development has received $63,341.52 in "management fees."

What precipitated this litigation was a letter sent by Holiday Mobile in July, 1973, to each of the limited partners of Holiday Isle. This letter requested the consent of the limited partners to the sale of Holiday Isle for the sum of $1,400,000. The letter went on to explain that after paying the Western Savings mortgage and the Dunkel mortgage, no monies would be left over for the limited partners. The letter also indicates that because of the deteriorating condition of the mobile home park, the offer of sale should be accepted. The letter concluded:

> . . . if we fail to obtain your consent, we will have no alternative but to take immediate legal action to recover on the debt obligation from the limited partnership, and foreclose the park so that it might be sold. . . .

Attached to the letter was a financial statement of Holiday Isle which showed that the limited partnership owed an indebtedness to the general partner, Holiday Mobile, in the sum of $362,559. This statement was false. The $362,559 figure represented a capital account deficit of Holiday Mobile, not a debt owed to it.

Upon receipt of this letter, the limited partners (Wood being a C.P.A.) concluded that the financial statement was incorrect and that in fact, if the partnership asset was sold, the limited partners would receive approximately $384,000. At this point, a sharp conflict in the facts exists. Holiday Mobile contends that Heiple and Wood,after ascertaining the true financial picture of the limited partnership, and without telling their fellow limited partners, proceeded to buy up all the remaining limited partnership interests for approximately five cents on the dollar. On the other hand, Wood and Heiple contend that after making full disclosure to all the limited partners, they

offered to either purchase the other limited partners interests for 5% of their investment or the limited partner could contribute that same 5% towards the payment of attorney's fees to seek a dissolution of the limited partnership and a distribution of its assets. The trial judge's judgment leaves unresolved this factual dispute.[2]

In any event, seven of the limited partners executed powers of attorney to Wood and Heiple, authorizing the commencement of this litigation and contributed towards the cost thereof.

Prior to filing suit, the limited partners met with Dunkel, pointed out the error in the financial statement, stated they represented all of the limited partners and requested that the proposed sale be completed. Dunkel refused on the basis that a sale at that time would have "adverse tax consequences" for Holiday Mobile. This litigation ensued.

The limited partners sought dissolution of the partnership on the following bases:

> (1) that Holiday Mobile had not complied with the articles of partnership which required the general partner to render monthly and annual accountings;
>
> (2) that Holiday Mobile had misrepresented the financial condition of the partnership by listing $362,559 as a debt of the partnership when in fact it was a capital deficit of Holiday Mobile;
>
> (3) that Holiday Mobile had improperly caused a $1,250,000 mortgage to be placed upon the partnership's assets;

---

2 The advisory jury's verdict is also not particularly helpful. Although specific interrogatories were requested to be answered by the jury, the trial judge refused to submit them.

(4) that Holiday Mobile had breached the articles of partnership by entering into the management fee agreement with National Mobile Homes Development Company; and

(5) that they were entitled to dissolution under the Uniform Partnership Act.

Several of the major issues that should have been resolved by this litigation were:

(1) whether the limited partnership should be dissolved;

(2) whether the proper financial positions of the respective parties in the limited partnership are reflected in the audit;

(3) whether the Dunkel mortgage on the Holiday Isle property was valid; and,

(4) whether the payment of "management fees" to National Mobile was proper under the articles of partnership.

As previously indicated, although specifically and repeatedly requested to do so, the trial judge simply failed to resolve these issues, except to order a dissolution of the partnership.

On appeal, Holiday Mobile and Dunkel raise the following issues:

(1) whether the trial court properly ordered dissolution of the partnership;

(2) whether the trial court erred in ordering Holiday Mobile to pay the cost of the Sergent audit report; and

(3) whether the trial court erred in dismissing the counterclaim of Dunkel and Holiday Mobile.

The cross-appeal of the limited partners raises these issues:

(1) whether the trial court erred in failing to award them attorneys' fees;

(2) whether the trial court erred in not providing for the manner in which the affairs of the partnership are to be wound up;

(3) whether the trial court erred in not declaring the Dunkel mortgage invalid;

(4) whether the trial court erred in failing to determine that both Dunkel and Holiday Mobile were liable to the limited partnership for the management fees paid to National; and

(5) whether the trial court erred in not ordering Holiday Mobile to supply monthly and annual accountings.

DISSOLUTION OF THE PARTNERSHIP

The appellants first contend that since the trial judge failed to make findings of fact and conclusions of law, the Sergent report must be considered as a "Special Master" report and must constitute the findings and conclusions of the trial judge. From this premise, they argue that since the Sergent report contains conclusions concerning the propriety of the Dunkel mortgage, the payment of management fees and the profitability of the limited partnership, these findings are inconsistent with the dissolution of the partnership and therefore the dissolution order must be reversed as unsupported by the evidence.

While the report of a master may constitute findings of fact andconclusions of law,*see* Rule 52(a), Rules of Civil Procedure, it is only those reports of masters which are appointed and function under the auspices of Rule 53, Rules of Civil Procedure, which are entitled to that status. Here, the trial court made no attempt to comply with this Rule of Civil Procedure. For example, Rule 53(h) provides:

> The court shall accept the master's findings of fact unless clearly erroneous. Within ten days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notices prescribed in Rule 6(c). The court *after hearing* may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions. (Emphasis added).

Notwithstanding the mandatory language that in the event objections are made to the report it will only be approved "after hearing," the trial judge afforded no hearing to the limited partners, and dismissed out of hand their objections before his approval. Under these circumstances, to afford the Sergent report the status of a master's findings of fact would thwart the Rules of Civil Procedure, and would deny the objectors due process.

Moreover, the legal conclusions of the report that the Dunkel mortgage was valid, that the management fee agreement was valid and that a *sua sponte* adjustment in the capital account of the general partner should occur were completely outside the delegation of responsibility to the auditor. These issues involve legal determinations based upon disputed factual positions, none of which the auditor heard or was qualified to rule upon. In short, the Sergent report cannot substitute for the failure of the trial judge to perform his judicial obligations.[3]

---

3 Rule 52(a), Rules of Civil Procedure, provides in part: "In all actions tried upon the facts without a jury or with an advisory jury, the court, if requested before trial, *shall* find the facts specifically and state separately its conclusions of law....." (Emphasis added).

A timely request was made in this case, but the trial judge refused to perform his required functions.

The most that can be said of the Sergent report is that it is to be afforded the status conferred upon it by the limited partners. The financial portion of the report is an acceptable recap of what appears on the books of Holiday Isle.

Holiday Mobile, in any event, contends that the evidence does not support a dissolution of the limited partnership. This argument is based primarily upon an assertion that the limited partnership is operating at a profit and that the limited partners waived any breach of partnership agreement concerning accountings.

It is clear that upon breach of the partnership agreement, one of the rights possessed by a limited partner under the Limited Partnership Act is to "have dissolution and winding up by decree of court." A.R.S. § 29-310 (A) (3).

However, an action of a partner which is merely trifling in nature or a temporary grievance without permanent damage does not form adequate grounds for dissolution. Rather the conduct must be legally substantial and evidence either gross misconduct or want of good faith or cause serious and permanent injury to the partnership. *Fuller v. Brough,* 159 Colo. 147, 411 P. 2d 18 (1966). Obviously, a breach of statutory duties imposed upon a general partner in a limited partnership, *see* A.R.S. § 29-309, would suffice to allow a court to dissolve a limited partnership.

A.R.S. § 29-309 provides in part that a general partner, without the consent of the limited partners, has no authority to:

> 1. Do any act in contravention of the certificate.

* * *

4. Possess partnership property, or assign their rights in the specific partnership property, for other than a partnership purpose.

As previously indicated, the limited partnership agreement provided that the general partner, Holiday Mobile, was to provide management of the limited partnership "all without fee." In direct contravention of this provision, Holiday Mobile entered into a "management fee" arrangement with National Mobile whereby 6% of the gross receipts of the limited partnership were paid for "management." This arrangement, of course, enures to the ultimate benefit of Dunkel, who was a 66% owner of Consolidated Securities and a 65% owner of National Mobile.

While we appreciate Holiday Mobile's assertion that this management arrangement may ultimately be beneficial to the limited partnership by providing an incentive to National Mobile to funnel renters to the Holiday Isle Mobile Home Park, the fact remains that this action is in contravention of the articles of partnership and was undertaken without prior approval of the limited partners.

Moreover, Dunkel caused the general partner, Holiday Mobile, to grant him a mortgage on the limited partnership property in the sum of $1,250,000. Even if that libality is prorated, a mortgage in the approximate sum of $330,000 was placed on the limited partnership assets at 12% interest. At the most, the limited partnership received a benefit from Dunkel's action of only $191,676.60 and money could be borrowed at that time for approximately 6% per annum. Aside from any orders of the bankruptcy court, which may or may not have approved of the placing of the mortgage on the limited partnership property, Holiday Mobile, as a general partner having complete

authority to deal with the partnership business,[4] stands in a fiduciary position to the limited partners. *Bassan v. Investment Exchange Corporation,* 83 Wash. 2d 922, 524 P. 2d 233 (1974).

Under the facts presented to the trial court, the placing of a mortgage on the limited partnership property greatly in excess of the value received and at a substantially higher rate of interest than was required resulted in a breach of the high standard of conduct required of a general partner when dealing with the limited partnership business. This breach of the fiduciary relationship resulted in substantial harm to the limited partnership.

While the advisory jury and the trial court may have found additional conduct of the general partner which would justify dissolution, we find these continuing substantial breaches of the articles of partnership and fiduciary relationship sufficient to uphold the order of dissolution.

We therefore conclude, regardless of the profitability of the limited partnership business overall, sufficient grounds existed to terminate the limited partnership.

COST OF ACCOUNTING

Following the jury's verdict in this matter the trial court ordered that an accounting of the partnership be prepared. The cost of this accounting was $4,500 and the trial court ordered this sum to be paid by Holiday Mobile. Holiday Mobile objects to this cost, contending that the accounting was superfluous, was improvidently sought, and therefore should, if anything, be a limited partnership expense rather than an expense to the general partner.

4/ We do not mean to intimate that the mortgage placed upon the limited partnership property was in fact a valid action of the general partner, a subject dealt with later in this opinion.

The assessment of the cost of an accounting in a partnership dissolution is a matter within the trial court's sound discretion. *Hurst v. Hurst,* 1 Ariz. App. 227, 401 P.2d 232 (1965). In view of the general partner's failure to render monthly or annual accountings to the limited partners for a period of over 10 years, its failure to keep complete records and its failure to allow the limited partners access to the books of the partnership, the trial court did not abuse its discretion in ordering the cost of accounting to be borne by the general partner.

PROPRIETY OF THE DISMISSAL OF COUNTERCLAIM

In this action, Holiday Mobile and Dunkel filed counterclaims alleging that the limited partners had unlawfully interfered with the limited partnership's contractual relationships or its property. As to Holiday Mobile, the trial court dismissed its counterclaim on the theory that prior to a dissolution or accounting one partner may not sue another for a transaction arising out of the partnership business. *See Catron v. Watson,* 12 Ariz. App. 132, 468 P. 2d 399 (1970). As to Dunkel, the trial court dismissed on the basis of a failure to state a claim.

In regard to the counterclaim of Holiday Mobile, it is clear in Arizona that insofar as a *general* partnership is concerned, the rule applied by the trial court was correct. *Jacob v. Cherry,* 65 Ariz. 307, 180 P. 2d 217 (1947); *Pejsa v. Bridges,* 69 Ariz. 315, 213 P. 2d 473 (1950); *Bohmfalk v. Vaughan,* 89 Ariz. 33, 357 P.2d 617 (1960). (*See,* however, specially concurring opinion in *Catron v. Watson, supra,* criticizing this result). Whether this rule should be applied to limited partnerships is less clear.

Whatever the reasons underlying the rule as applied to general partnerships, we see no reason to extend that rule to limited partnerships. Limited partners may be added without affecting continuation of the partnership. A.R.S. § 29-308. Limited partners have no liability to creditors of

the partnership. A.R.S. § 29-307. Limited partners have no right to control the business of the partnership and have limited rights in the partnership assets. A.R.S. § 29-316.

In short, the "oneness" associated with general partners certainly does not exist in a limited partnership[5] Seeing no reason to treat the members of a limited partnership differently from the other litigants in civil actions, we conclude the trial court erred in dismissing Holiday Mobile's counterclaim solely on the basis of the status of the parties.

In regard to Dunkel's position on the counterclaim, we conclude the trial court acted properly. Nowhere in that counterclaim is it alleged that any injury was suffered by Dunkel, nor was any relief prayed for in his behalf. Because injury to the plaintiff is an essential element of the tort of wrongful interference with contractual relationships, the counterclaim as to Dunkel failed to state a claim for relief. *Chanay v. Chittenden,* 115 Ariz. 32, 563 P.2d 287 (1977).

We now turn to those issues raised by the limited partners' cross-appeal.

VALIDITY OF THE DUNKEL MORTGAGE

The Dunkel mortgage grew out of the Chapter X bankruptcy of Holiday Mobile. The order of the bankruptcy court purportedly authorizing the mortgage on the limited partnership property stated: "That Wilfred O. Dunkel shall receive as security for the total amount of money provided by him for the Special Fund, mortgages on all property

5 / Most jurisdictions recognize that general and limited partners may sue each other to enforce the partnership agreements, without first resorting to a dissolution. *See generally,* 68 C.J. S., Partnerships, § 485, page 1037.

owned by the debtor corporation and its subsidiaries . . ."(Emphasis added).

We agree with the limited partners that this order on its fact did not authorize the placing of a mortgage on the limited partnership property. First, the limited partnership property was not owned by the general partner, Holiday Mobile, but is considered to be owned by the limited partnership firm. *State v. Elsbury,* 63 Nev. 463, 175 P. 2d 430 (1946). Second, Holiday Isle is not a "subsidiary" of the general partners, as the word "subsidiary" was defined at the time by the Bankruptcy Act as a "corporation" which is substantially owned or controlled by the bankrupt. 11 U.S.C. § 506 (13) (1970 ed., subsequently amended).

Dunkel argues, however, that because of various notices received by the limited partners, and conferences between the trustee and the limited partners, they had knowledge that the limited partnership property was to be encumbered under the Dunkel financial plan, that the financial plan would not have gone through without this encumbrance and that the limited partnership property would have been lost without the Dunkel infusion of cash. From these premises, Dunkel argues that either the limited partners are estoppel to deny the validity of the mortgage or he is entitled to an equitable mortgage on the property.

The limited partners in the other hand argue that the facts before the trial court do not support a finding that they had prior knowledge of the actions of the trustee and that an equitable mortgage would in fact allow a general partner to encumber limited partnership property in payment of the general partner's obligation, contrary to the provisions of the limited partnership act.

While the trial court's judgment did not resolve the factual dispute, we do not consider this failure to be fatal to a resolution of this issue. The evidence is clear that at the time of the Dunkel offer to bail Holiday Isle out of its financial difficulties, the Western Savings mortgage on the partnership property was in arrearage in the sum of $138,624.20, and that Holiday Isle owed general creditors the sum of $29,621.14 and owed back taxes in the sum of $23,431.26. It is equally clear that the limited partners were not in a position to pay these debts.

While technically, as to creditors, these debts were an obligation of the general partners and the limited partners had no obligation to pay the same, A.R.S. § 29-307, the failure of the general partner to pay these obligations, particularly the Western Savings mortgage and the back taxes, would have resulted in the loss of the only asset of the limited partnership.

Thus, whether we consider the Dunkel financial aid to be a loan to the trustee in bankruptcy or a loan to the general partner, Holiday Mobile, is somewhat immaterial, for the fact remains that Dunkel's action bestowed a benefit upon the limited partnership which allowed it to continue in existence.

Under these circumstances, the trustee's authorization to Holiday Mobile to place a mortgage on the Holiday Isle property and Dunkel's reliance upon that authorization can properly be characterized as a "mistake of law," that is, "a mistake as to the legal consequences of an assumed state of fact." Restatement, Restitution § 7

By reason of that mistake of law, Dunkel is, at least, entitled to restitution. Restatement, Restitution § 52(1); *Harline v. Daines*, 567 P2d 1120 (Utah 1977). Restitution in this case should take the form od an equitable mortgage on the limited partnership real property. However, that

equitable mortgage must be limited to the amount of benefits actually bestowed upon the limited partnership, the sum of $191,676.60. Moreover, equity would require that the equitable mortgage bear interest at the market rate at the time of the transaction, in this case, 6% per annum.

We therefore hold that the Dunkel mortgage on the limited partnership is valid in the principal sum of $191,676.60, which sum shall bear interest at the rate of 6% per annum from the date of its inception.

All payments previously made by the limited partnership on the mortgage shall be credited and upon remand the trial court shall determine the balance due and owing on this mortgage. In the event the mortgage has been overpaid, the trial court shall declare the mortgage lien satisfied and shall enter judgment in favor of the limited partnership against Dunkel for such overage.

ATTORNEYS' FEES

The limited partners contend they are entitled to attorneys'fee under A.R.S. § 12-341 01A, which provides in part: "In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees." This section was effective as of September 1, 1976. The limited partners' action was commenced prior to that date. Under these circumstances, we have held that A.R.S. § 12-341 01A is not applicable. *US Life Title co. v. Soule Steel Co.*, 122 Ariz.79, 593 P.2d 302 (App.1977). The trial court properly denied the limited partners' application for attorneys' fees.

MANAGEMENT FEES

The limited partners next complain that the trial court failed to find Dunkel and Holiday Mobile personally liable for the payment of "management fees" to the National Mobile Development Company in contravention to the articles of limited partnership. We have previously held that these payments were a breach by the general partner of the partnership agreement. It must necessarily follow therefrom that these expenditures by the general partner were improper, and in any final accounting, the amount of such unauthorized expenditures must be deducted from the general partner's capital account.

However, we find that the evidence before the trial court was insufficient to allow the piercing of the corporate veil necessary to impose personal liability upon Dunkel for these expenditures or for any other debts that the general partner may owe to the limited partnership. In this regard, the trial court's failure to impose personal liability upon Dunkel was proper.

WINDING UP AND ACCOUNTING

Since we have upheld the dissolution of this limited partnership, upon remand the trial court shall make such orders as it deems advisable to effectuate the speedy winding up of the partnership affairs, the dissolution of the partnership, and the distribution of the proceeds to the parties. In this regard, it would appear that the appointment of a receiver to accomplish this end would be in order. In addition, the trial court should consider ordering a new accounting to bring financial affairs of the limited partnership current and to give effect to any changes required by this decision.

The judgment dissolving the limited partnership is affirmed. The judgment dismissing the counterclaim of Holiday Mobile is reversed and this matter is remanded for trial. The judgment dismissing the Dunkel counterclaim is affirmed. This entire matter is remanded to the trial court for such orders and further proceedings as are necessary to conform to this opinion.

EINO M. JACOBSON

Eino M. Jacobson, Acting Presiding Judge

CONCURRING:

WILLIAM E. EUBANK

William E. Eubank, Judge

JACK L. OGG

Jack L. Ogg, Chief Judge Division 1

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

DALE R. SHUMWAY, being first duly sworn upon his oath deposes and says that he is a member of the Bar of this Court and one of the counsel of record for petitioners in this cause, that on this 19th day of May, 1981, he mailed three copies of the Petition for Writ of Certiorari in this cause by depositing the Petition in the United States mail, first class postage paid, to:

Mr. Philip Berelson
BROWN & BAIN, P.A.
222 North Central
Phoenix, Arizona 85004

and that he also then mailed 40 copies of the Petition to the Clerk of this Court, first-class postage prepaid, which mailing took place on the 19th day of May, 1981, which was in time permitted for bringing this Petition, all in compliance with Supreme Court Rule 28.

Dale R. Shumway
DALE R. SHUMWAY

SUBSCRIBED AND SWORN TO before me this 19th day of May, 1981.

Beverly A. Davis
Notary Public

My Commission Expires:

4-4-85

Office-Supreme Court, U.S.
FILED
JUN 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1964

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

HOLIDAY MOBILE HOME RESORTS, INC. AND WILFRED O. DUNKEL,

Petitioners,

vs.

R. DIXON WOOD AND DON W. HEIPLE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Was it improper for the state court of appeals to conclude that the assets of a limited partnership in which the corporate debtor was merely the general partner were not subject to a federal bankruptcy court order authorizing realty mortgages "on all property owned by the debtor corporation and its subsidiaries," where the federal bankruptcy court declined to decide whether the limited partnership was a "subsidiary" and called the issue "a question of law" for resolution by the state courts?

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No. 80-1964

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

HOLIDAY MOBILE HOME RESORTS, INC. AND WILFRED O. DUNKEL,
Petitioners,

vs.

R. DIXON WOOD AND DON W. HEIPLE,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, R. Dixon Wood and Don W. Heiple, respectfully pray that this Court refuse to issue a writ of certiorari to review the decision of the Arizona Court of Appeals, Division One, entered on December 26, 1980 and award respondents damages against petitioners pursuant to Supreme Court Rule 49.2

RESTATEMENT OF THE CASE

The Holiday Isle limited partnership (the "limited partnership") was formed in 1964. Since its formation, petitioner Holiday Mobile Home Resorts, Inc. ("Holiday Mobile") has been the general partner with full responsibility for management. *Wood v. Holiday Mobile Home Resorts, Inc.*, ____ Ariz. App. ____, 625 P.2d 337, 340 (1981).

On March 10, 1971, Holiday Mobile was placed in federal bankruptcy proceedings under Chapter X of the Bankruptcy Act. *Id.* Subsequently, the federal Bankruptcy Court approved a plan whereby petitioner Wilfred O. Dunkel acquired control of Holiday Mobile by agreeing to provide a letter of credit and cash to bring current Holiday Mobile's debts, in return for a controlling interest in its common stock and mortgages on real property owned by Holiday Mobile and "its subsidiaries." As a result of this action, Dunkel did receive a mortgage from Holiday Mobile on the real property owned by it and its subsidiaries. *Id.* In addition, Dunkel caused Holiday Mobile, as general partner of the Holiday Isle limited partnership, to execute a mortgage on the real property of the limited partnership without the approval of any of the limited partners. The mortgage on all the properties was in the face amount of $1,250,000. *Id.* Holiday Mobile's Chapter X proceeding in Bankruptcy Court was thereafter terminated.

In July 1973, Holiday Mobile sent to each limited partner a letter requesting consent to the sale of the sole asset of the limited partnership, its mobile home park in Tucson, Arizona, for a sales price of $1,400,000. The letter proposed that the limited partnership be dissolved and that the outstanding mortgages on the limited partnership's property, including the mortgage to Dunkel, be paid. The letter also stated that ". . . if we fail to obtain your consent, we will have no alternative but to take immediate legal action to recover on the debt obligation from the limited partnership, and foreclose the park so that it might be sold. . ." *Id.* at 341. Respondents, faced with the imminent sale of the limited partnership property by petitioners without the written consent of the limited partners and in contravention of the requirements of Ariz. Rev. Stat. § 29-309 (1956), commenced the underlying action for an accounting and dissolution of the limited partnership.

By 1973 petitioners had violated the fiduciary duty they owed to the limited partnership in at least the following ways:

(1) Payment to a company controlled by petitioner Dunkel of management fees in violation of the Articles of Limited Partnership;

(2) Refusal to permit respondents to inspect the books and records of the limited partnership and removal of them from Arizona, despite the requirements of Ariz. Rev. Stat. § 29-310 (1956);

(3) Failure to provide the limited partners with detailed monthly accountings of receipts and disbursements of all funds of the limited partnership;

(4) Failure to have an annual audit of the limited partnership conducted by a certified public accountant;

(5) Using limited partnership assets to secure a loan by petitioner Dunkel to the general partner, petitioner Holiday Mobile, by placing the previously described mortgage on the limited partnership's mobile home park in August 1971;

(6) Gross misrepresentations to the limited partners; and

(7) Rejecting a third party's favorable offer to purchase the limited partnership's assets because of unfavorable tax consequences for the general partner, petitioner Holiday Mobile.

In May 1975, respondents attempted to reopen Holiday Mobile's Chapter X proceedings to obtain an interpretation of the July 8, 1971 Bankruptcy Court order (the "Order"), which allegedly authorized the $1,250,000 mortgage on the limited partnership's assets. The Order held in pertinent part "[t]hat Wilfred O. Dunkel shall receive as security . . . mortgages on all property owned

by the debtor corporation and its subsidiaries . . . providing for interest at the rate of 12% per annum. . . ." Pet. App. at A-5 (emphasis added).

The Bankruptcy Court, however, abstained from deciding whether the limited partnership was a "subsidiary" of its general partner, petitioner Holiday Mobile, subject to the Order. Instead, the Bankruptcy Court sent the issue back to the state courts for resolution, stating, "It's a question of law." Plaintiffs' Attempt to Reopen Holiday Mobile's Chapter X Proceedings, Transcript of Hearing dated May 21, 1975 at 11.

In the opinion below which is the subject of the petition, the Arizona Court of Appeals accepted the Bankruptcy Court's invitation and held that

> . . . this order on its face did not authorize the placing of a mortgage on the limited partnership property. First, the limited partnership property was not owned by the general partner, Holiday Mobile, but is considered to be owned by the limited partnership firm. *State v. Elsbury*, 63 Nev. 463, 175 P.2d 430 (1946). Second, Holiday Isle is not a "subsidiary" of the general partner, as the word "subsidiary" was defined at the time by the Bankruptcy Act as a "corporation" which is substantially owned or controlled by the bankrupt. 11 U.S.C. § 506 (13) (1970 ed., subsequently amended).

Wood, 625 P.2d at 345.

The Arizona Court of Appeals also decided that petitioner Dunkel was entitled to restitution from the limited partnership because his extension of credit to Holiday Mobile benefited Holiday Isle, Ltd. The state court therefore created an equitable mortgage on the limited partnership's real property "limited to the amount of benefits actually bestowed upon the limited partnership, the sum of $191,676.60 . . . bear[ing] interest at the

market rate at the time of the transaction, in this case, 6% per annum." *Id.* at 346.

Contrary to petitioners' claims, the Arizona Court of Appeals' discretionary creation of an equitable mortgage was *not* inconsistent with the Bankruptcy Court Order which allegedly created a 12% mortgage on the limited partnership's property. *Cf.* Pet. at 7. That Order simply did not authorize the placing of a mortgage on the *limited partnership's* assets but, rather, applied only to the assets of the general partner's *subsidiaries*. Thus, by placing an equitable mortgage with a six percent interest rate on the limited partnership property, the Arizona Court of Appeals did not "modify the terms of the Bankruptcy Court Order" [*id.* at 8] so as to collaterally attack the District Court's order. It merely exercised its independent equitable power to encumber real estate to provide restitutionary relief when it placed the $191,676.60, mortgage on the limited partnership property. *Wood*, 625 P.2d at 345.

Petitioners sought both rehearing by the Arizona Court of Appeals (which was denied on January 28, 1981) and review by the Arizona Supreme Court (which was denied on February 18, 1981). After these denials, the case was remanded to the trial court to carry out the dissolution and accounting. On April 28, 1981, nearly four years after the trial court first ordered an accounting and dissolution, the court appointed a receiver. In response, petitioners have once more sought to delay this outcome by petitioning this Court for review on writ of certiorari.

REASONS FOR DENYING THE WRIT

I. *No "Special and Important Reasons" Exist in this Action for Granting Review upon Writ of Certiorari.*

Petitioners have completely failed to raise any "special and important reasons" to support a grant of

review on writ of certiorari. Sup. Ct. R. 17.1. Nor have they demonstrated that the Arizona Court of Appeals "decided a federal question in a way in conflict with applicable decisions of this Court" [Sup. Ct. R. 17.1(c)] or with the decisions of either "another state court of last resort or of a federal court of appeals" [Sup. Ct. R. 17.1(b)]. As discussed in greater detail below, the Arizona Court of Appeals followed settled state and federal law to hold that the limited partnership's assets were not subject to the Bankruptcy Court's Order.

II. *The Arizona Court of Appeals Correctly Decided that the Limited Partnership's Real Property Was Not Subject to the Bankruptcy Court's Order.*

Notwithstanding petitioners' claims, the Arizona Court of Appeals correctly followed state and federal law when it held that the Bankruptcy Court's July 8, 1971 Order did not authorize a mortgage on the limited partnership's real property. The Order, by its very terms, reached only the "property *owned by the debtor corporation [Holiday Mobile] and its subsidiaries.*" *Wood,* 625 P.2d at 345 (emphasis in original). The Arizona Court of Appeals recognized that Holiday Mobile, as the limited partnership's general partner, did not "own" the limited partnership property under Arizona law. *Id.; citing State v. Elsbury,* 63 Nev. 463, 175 P.2d 430 (1946). Furthermore, since the old Bankruptcy Act defined a "subsidiary" of a Chapter X debtor "as a '*corporation*' which is substantially owned or controlled by the bankrupt" [*Wood,* 625 P.2d at 345 (emphasis added); *citing* 11 U.S.C. § 506(13) (1970 ed. subsequently amended)], the Arizona Court of Appeals could hardly have characterized the *limited partnership's* assets as those of a "subsidiary" subject to the Order.

It deserves emphasis that the Bankruptcy Court specifically refused to reopen the Chapter X proceedings

to determine whether the limited partnership was a "subsidiary" subject to the Order. Instead, it called the issue "a question of law" to be determined by the state court. The Bankruptcy Court clearly had the discretionary authority to defer this issue to the state court because the Order's interpretation would affect state-defined property rights. *Mangus v. Miller,* 317 U.S. 178, 186 (1942); *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 483-84 (1940); *Ex parte Baldwin,* 291 U.S. 610, 619 & n.12 (1934); *In re First Baptist Church, Inc.,* 564 F.2d 677, 680 (5th Cir. 1977); *Kaplan v. Guttman,* 217 F.2d 481, 483 (9th Cir. 1954); *In re United Merchants and Manufacturers, Inc.,* 3 B.R. 286, 301-02 (S.D.N.Y. 1980).

Therefore, the Court of Appeals' ruling was entirely proper because it neither collaterally attacked nor encroached directly on the Bankruptcy Court's Order. *National Acceptance Company of America, Inc. v. Frigidmeats, Inc.,* 627 F.2d 764, 765 (7th Cir. 1980). The Arizona Court of Appeals only interpreted the Order (following the Bankruptcy Court's express abstention) and determined that the limited partnership's property was not subject to it, an act proper under both federal and state law. *Popp v. Eberlein,* 409 F.2d 309, 311 (7th Cir.), *cert. denied,* 396 U.S. 909 (1969); *Kadish v. Phoenix-Scottsdale Sports Co.,* 11 Ariz. App. 575, 466 P.2d 794 (1970); *Cross Water Co. v. Ferrero,* 32 Cal. App.2d 497, 90 P.2d 98 (1939).*

In sum, the Arizona Court of Appeals never mod-

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*While petitioners correctly state that a district court's order entered after a proper exercise of jurisdiction cannot be collaterally attacked [*Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 376 (1940); *Cutler v. Huston,* 158 U.S. 423, 430-31 (1895)], that rule is totally inapposite to this case since the Arizona Court of Appeals construed the meaning of the Order only after the Bankruptcy Court refused to do so.

ified or invalidated a federally-ordered mortgage [*cf.* Pet. at 7-8]. Rather, it exercised its independent discretionary authority to create a separate, equitable $191,676.60 mortgage to provide petitioner Dunkel with restitutionary relief.

III. *Because the Petition Raises Only Frivolous Issues, Respondents Request the Court to Award Them Damages Pursuant to Supreme Court Rule 49.2.*

As demonstrated above, petitioners raise no colorable argument that the Arizona Court of Appeals acted contrary to the applicable decisions of this Court, any federal appellate court or any other state court regarding a "federal question." Instead, they have attempted to obscure the true factual nexis from which the petition arises to maximize the probability of review, and to thereby delay further the accounting and dissolution which the trial court and state appellate court have authorized.

In view of (i) the petition's total lack of merit and (ii) petitioners' obvious pursuit of review by the Court solely to delay the inevitable distribution of the limited partnership's assets, respondents urge the Court to award damages in their favor against petitioners pursuant to Supreme Court Rule 49.2 in the amount of the attorneys' fees and disbursements they have incurred in opposing this petition. As detailed in the Affidavit of Robert M. Owen in Support of Respondents' Request for Attorneys' Fees submitted herewith at A-1, respondents have paid $600.00 in disbursements to date and submit that $3,000.00 represents a reasonable award of attorneys' fees. Respondents also respectfully suggest that petitioners' frivolous effort is an appropriate petition against which to adjudge double costs pursuant to Supreme Court Rule 50.7.

CONCLUSION

For the foregoing reasons, the Court should decline to review this case by writ of certiorari.

Respectfully submitted,

PHILIP P. BERELSON
222 North Central Avenue
Phoenix, Arizona 85004
Attorney for Respondents

Of Counsel:
Neil S. Cumsky
Robert M. Owen
BROWN & BAIN, P.A.
222 North Central Avenue
Phoenix, Arizona 85004

APPENDIX

IN THE

SUPREME COURT

OF THE UNITED STATES

HOLIDAY MOBILE HOME RESORTS, INC. and WILFRED O. DUNKEL, *Petitioners,* vs. R. DIXON WOOD and DON W. HEIPLE, *Respondents.*	No. 80-1964 AFFIDAVIT OF ROBERT M. OWEN IN SUPPORT OF RESPONDENTS' REQUEST FOR DAMAGES

ROBERT M. OWEN, being first duly sworn, deposes and states:

1. I am associated with the law firm of Brown and Bain, P.A. and make this affidavit in support of respondents' request for damages set forth in the Brief in Opposition to Petition for a Writ of Certiorari.

2. I have been a practicing attorney in Phoenix, Arizona since October 1980 and am one of the attorneys

for the respondents in this action. As such, I am fully aware of the facts and circumstances herein.

3. As of the date of this affidavit, the undersigned and members of the firm of Brown & Bain, P.A. spent more than 45 hours in connection with the opposition to the above-entitled petition for certiorari, including legal research regarding questions raised in the petition; preparation of respondents' Brief in Opposition to Petition for a Writ of Certiorari; and preparation of this Affidavit in Support of Respondents' Request for Damages.

4. In my experience, the amount of attorneys' fees hereinafter set forth is comparable to those charged for other attorneys in the Arizona legal community for comparable services and I hereby submit that the attorneys' fees for preparation of such a Brief in Opposition to Petition for Writ of Certiorari and related activities should not be less than $3,000.00.

5. Also, substantial printing charges have been incurred in the preparation of respondents' Brief in Opposition to Petition for a Writ of Certiorari. Those printing charges, as well as other sums necessarily disbursed in respondents' opposition to petitioners' brief, total no less than $600.00.

6. Petitioners' brief has raised no colorable issues of federal law deserving consideration by the Court and is, thus, totally frivolous. For that reason (and because this petition was sought merely to delay the ultimate resolution of this lawsuit in respondents' favor), an award of damages against petitioners pursuant to Supreme Court Rule 49.2 is appropriate.

7. Respondents' damages caused by Holiday Mobile Home Resorts, Inc. and Wilfred O. Dunkel's frivolous petition consist mainly of the aforementioned disbursements and attorneys' fees. These damages total no less than $3,600.00.

/s/

Robert M. Owen

SUBSCRIBED AND SWORN to before me this _____ day of June, 1981.

/s/

Notary Public

My Commission Expires:

_____

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

PHILIP P. BERELSON, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for respondents in this cause; that on this 18 day of June, 1981, he mailed three copies of respondents' Brief in Opposition to Petition for a Writ of Certiorari in this cause by depositing same in the United States mail, first-class postage prepaid, to:

Mr. Dale R. Shumway
UDALL, SHUMWAY, BLACKHURST,
ALLEN & DAVID, P.C.
30 West First Street
Mesa, Arizona 85201

and that he also mailed forty copies of respondents' Brief in Opposition to Petition for a Writ of Certiorari to the Clerk of this Court, first-class postage prepaid; all in compliance with Supreme Court Rule 28.

/s/
Philip P. Berelson

SUBSCRIBED AND SWORN to before me this 18 day of June, 1981.

/s/
Notary Public

My Commission Expires:

_____

Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1964

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

HOLIDAY MOBILE HOME RESORTS, INC. AND WILFRED O. DUNKEL,
Petitioners,

vs.

R. DIXON WOOD AND DON W. HEIPLE,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

UDALL, SHUMWAY, BLACKHURST, ALLEN, LYONS, & DAVIS, P.C.

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Counsel of Record for Petitioners

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No. 80-1964

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

HOLIDAY MOBILE HOME RESORTS, INC. AND WILFRED O. DUNKEL,

Petitioners,

vs.

R. DIXON WOOD AND DON W. HEIPLE,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner's request for a Writ of Certiorari is meritorious, and therefore Respondents are not entitled to damages pursuant to Supreme Court Rule 49.2.

At the time that Mr. Wilfred O. Dunkel invested his money in the faltering Holiday Mobile Home Resorts properties, it was clearly his intent, as testified at trial, to receive as security for his loans *all* properties which were either owned or administered by Holiday Mobile Home Resorts. This was clearly understood by all parties

concerned in the Federal Bankruptcy proceedings, and the Respondents did not at that time object to the use of Mr. Dunkel's money to salvage their partnership investment.

Therefore, when Mr. Dunkel loaned Holiday Mobile Home Resorts the sum of $1,250,000.00, it was clearly understood by all parties that he would receive liens on the corporate property, as well as the Holiday Isle property, as security for his loan. Apparently, the Court of Appeals of Arizona recognized this underlying intent, and gave Mr. Dunkel an equitable mortgage in the partnership property. It is Petitioners' claim that this attempt to in actuality sustain the Federal District Court's action of imposing a lien on partnership property under equity principles is an attempt to get around any technical legal problems inherent in the sematics of the Federal Court Order.

The Petitioners have no objection to the Court of Appeals placing an equitable mortgage on the partnership property; however, the fact such court went one step further and reduced Mr. Dunkel's interest on his money from the rate of 12% ordered by the Bankruptcy Court to 6%, clearly modifies the terms of the original Federal Court Order.

There was substantial evidence presented in the court below that all the parties privy to the original Federal District Court Order understood that the term "subsidiary" would naturally, include the Holiday Isle partnership property. Mr. Dunkel would not have consumated the transaction with the trustee had this property been excluded from the effect of his lien. For the Arizona Court of Appeals to now refuse to recognize this underlying intent by sidestepping Mr. Dunkel's entitlement purely on a legal definition, undermines the intent of the Federal Court's Order.

If the Court of Appeals is to tacitly recognize the existence and enforceability of the Federal Court Order by characterizing it as an equitable mortgage, then the Court of Appeals should also include the original interest provision provided by the Federal Court. By failing to recognize an interest provision that was deemed reasonable at the time of its making, and substituting an interest rate substantially lower, the Court of Appeals has collaterally attacked the Federal Court's Order.

In this regard, Petitioner's feel that their Petition is meritorious. Further,this Petition is not brought soley for the reason of delay. It should be pointed out to this court that Petitioner's Petition for Writ of Certiorari in no way has hindered or delayed the implementation of the Court of Appeals Order of appointment of Receiver, liquidation of assets, and sale of partnership property. These matters are presently proceeding without delay. In fact, the Maricopa County Superior Court has already appointed a Receiver, and he has taken charge of the property and is attempting to administer the property in accordance with the trial court's order. The parties have agreed to the appointment of an appraiser for purposes of sale of the property, and a Special Master has been appointed to handle the accounting required during the Receivership.

The only reason Petitioners have brought their Petition for Writ of Certiorari is because they justifiably feel that the Arizona Court of Appeals overstepped its bounds by reducing Mr. Dunkel's interest rate on a valid security instrument ordered by the Federal District Court, which thus constituted an attack upon a Federal Court Order.

In view of the foregoing, it is maintained that Respondent's request for damages pursuant to Supreme Court Rule 49.2, and double costs pursuant to Rule 50.7, should be denied.

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

DALE R. SHUMWAY, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for Petitioners in this case, that on this **26th** day of June, 1981, he mailed three copies of the Petitioner's Reply to this cause by depositing the Reply in the United States mail, first class postage prepaid, to:

Mr. Philip Berelson
BROWN & BAIN, P.A.
222 North Central
Phoenix, AZ 85004

and that he also then mailed 40 copies of the Reply to the Clerk of this Court, first-class postage prepaid, which mailing took place on the 26th day of June, 1981, which was within the time permitted for filing this Reply, all in accordance with Supreme Court Rule 28.

DALE R. SHUMWAY

SUBSCRIBED AND SWORN to before me this **26th** day of June, 1981.

Notary Public

My Commission Expires:

My Commission Expires Feb. 1, 1985

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

Dale R. Shumway
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